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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Wilton Alexander, et al.,

No. CV-17-02673-PHX-BSB

10 Plaintiffs,

ORDER

11 v.

12 Geraldine A Pauloski, et al.,

13 Defendants.

14
15 Defendants Geraldine A. Pauloski and Farnsworth Realty & Management
16 Company have filed a motion to dismiss Plaintiffs' claims for failure to state a claim
17 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 18.) Defendants
18 argue that Plaintiffs' claims in this matter are barred because they should have been
19 asserted as compulsory counterclaims in an earlier eviction action in state court. (*Id.*)
20 The motion is fully briefed. (Docs. 21, 22.) For the reasons below, the Court denies the
21 motion.

22 **I. Background**

23 On August 8, 2017, Plaintiffs Wilton Alexander, Juanetta Wagoner, and Ruby
24 Wagoner filed a Complaint alleging violations of the Fair Housing Act of 1988,
25 42 U.S.C. §§ 3601-3619 (Count One), the Arizona Fair Housing Act, Ariz. Rev. Stat.
26 § 41-1491.19 (Count Two), breach of the implied warranty of habitability (Count Three),
27 negligence (Count Four), and intentional infliction of emotional distress (Count Five).
28 (Doc. 1.) The Complaint alleges that in 2015 Plaintiffs entered into a written lease with

1 Defendant Farnsworth Realty & Management Company (“Farnsworth”) for property in
2 Mesa, Arizona. (*Id.* at ¶¶ 1, 10.) After Plaintiffs took occupancy of the property, they
3 had issues with the stove, a leak in the bathroom that was not repaired properly, a roach
4 infestation, and a malfunctioning dishwasher. (*Id.* at ¶¶ 11-21.) Plaintiffs remained in
5 the property from November 1, 2015, until there were evicted on May 30, 2017, and
6 vacated the property on June 5, 2017. (*Id.* at ¶ 23.)

7 Around March 23, 2017, Farnsworth served a “10 Day Legal Notice” on Plaintiffs.
8 (*Id.* at ¶ 33.) The notice stated that Farnsworth received notice that the property was in
9 poor condition, was being maintained in an unsanitary and hazardous manner due to
10 heavy clutter, and had a roach infestation. (*Id.* at ¶ 34.) On April 21, 2017, Farnsworth
11 sent a second “10 Day Legal Notice” stating Plaintiffs had “made progress on the
12 property,” but that Farnsworth was still concerned about the roach infestation. (*Id.* at
13 ¶ 35.) On April 27, 2017, Plaintiffs had the property treated for the roach infestation.
14 (*Id.* at ¶ 37.)

15 Plaintiffs allege that Ruby Wagoner is 95 years old. (*Id.* at ¶ 27.) They also allege
16 that both Ruby and Juanetta Wagoner are individuals with disabilities within the meaning
17 of 42 U.S.C. § 3601 and Ariz. Rev. Stat. § 41-1491(5). (*Id.* at ¶¶ 27-31.) They allege
18 that Plaintiff Alexander is 87 years old, has high blood pressure, has had open heart
19 surgery, and is the caregiver for Ruby and Juanetta Wagoner. (*Id.* at ¶ 32.) On April 20,
20 2017, Monica Abrante, M.D., signed a request for reasonable accommodation for Ruby
21 and Juanetta Wagoner. (*Id.* at ¶ 42.) The request explained that Plaintiffs Ruby and
22 Juanetta Wagoner could only perform limited housekeeping due to their disabilities. (*Id.*
23 at ¶ 41.) These Plaintiffs “requested exceptions for items related to health care” and
24 “requested some patience as Plaintiffs eradicated or attempted to eradicate the roach
25 infestation.” (*Id.*) On May 9, 2017, Farnsworth received the request for reasonable
26 accommodations. (*Id.* at ¶ 40.)

27 In the meantime, on May 1, 2017, Farnsworth sent a certified letter to Plaintiffs
28 indicating that the lease had been terminated and that Plaintiffs must vacate the property

1 within ten days. (*Id.* at ¶ 38.) Defendants terminated the lease due to the roach
2 infestation and because living conditions related to the infestation “had not been brought
3 into compliance.” (*Id.* at ¶ 39.) On May 23, 2017, Farnsworth filed an eviction action
4 against Plaintiffs in the San Tan Justice Court (CC2017-094613EA). (*Id.* at ¶ 44.) At the
5 May 30, 2017 eviction hearing, Farnsworth acknowledged receipt of the request for
6 reasonable accommodation. (*Id.* at ¶ 45.) Plaintiffs urged Farnsworth to consider
7 reasonable accommodation under the Fair Housing Act of 1988 and the Arizona Fair
8 Housing Act. (*Id.* at ¶ 50.) Farnsworth refused to reconsider the request for reasonable
9 accommodation. (*Id.* at ¶ 51.) On May 30, 2017, Farnsworth obtained a judgment of
10 eviction. (*Id.* at ¶ 52.)

11 On June 1, 2017, representatives from Farnsworth informed Plaintiffs they had
12 thirty days to leave the property before being evicted and that Farnsworth would allow
13 the storage of their personal property for another twenty days. (*Id.* at ¶ 54.) However,
14 following the eviction, Farnsworth “forced Plaintiffs to immediately leave the residence
15 by June 5, 2017, at 5:00 p.m. giving no reasonable accommodation to Plaintiffs despite
16 either [their] advanced ages [or] disability status.” (*Id.* at ¶ 55.) Plaintiffs allege that as a
17 result of Defendants’ conduct, they “suffered actual and monetary damages, including
18 damages for mental anguish, pain, suffering, emotional distress, humiliation,
19 embarrassment, inconvenience, loss of the right to an equal opportunity to enjoy their
20 dwelling and loss of their civil rights under the Fair Housing Act.” (*Id.* at ¶¶ 69, 84.)

21 **II. Standard for Motion to Dismiss**

22 “A Rule 12(b)(6) motion tests the legal sufficiency of a claim.” *Navarro v. Block*,
23 250 F.3d 729, 732 (9th Cir. 2001). A court will dismiss a complaint for failing to state a
24 claim when the face of the complaint establishes affirmative defenses. *See Parungao v.*
25 *Community Health Systems, Inc.*, 858 F.3d 452, 457 (7th Cir. 2017) (stating that
26 dismissal is appropriate when it is clear from the face of a complaint, and matters of
27 which the court may take judicial notice, that the plaintiff’s claims are barred as a matter
28 of law). Defendants assert that Plaintiffs’ complaint fails to state a claim upon which

1 relief can be granted because it asserts claims that are barred under the doctrine of res
2 judicata. (See Doc. 18.) Specifically, Defendants argue that Plaintiffs' claims should
3 have been asserted as compulsory counterclaims, under Rule 13(a) of the Arizona Rules
4 of Civil Procedure, in an earlier state court eviction action.¹ (*Id.* at 2.)

5 The Court applies state law to determine whether Plaintiffs' claims are
6 compulsory counterclaims that should have been pleaded in the earlier state court
7 eviction action. *See Pochiro v. Prudential Ins. Co. of Amer.*, 827 F.2d 1246, 1249 (9th
8 Cir. 1987).² “A plaintiff’s claims are barred by res judicata if they should have been pled
9 as compulsory counterclaims in a previous action, if the previous action was adjudicated
10 on the merits, and if the present claims concern the same parties or their privies.” *Am.*
11 *Bank of the North v. Sullivan*, 2017 WL 3268795, at *2 (D. Ariz. Aug. 1, 2017) (citing
12 *Rousselle v. Jewett*, 421 P.2d 529, 531 (Ariz. 1966), and *Mirchandani v. BMO Harris*
13 *Bank, N.A.*, 326 P.3d 335, 337 (Ariz. 2014)). The burden of proving these elements rests
14 with the party asserting that res judicata applies to bar a claim. *State Compensation Fund*
15 *v. Yellow Cab Co. of Phoenix*, 3 P.3d 1040, 1044 (Ariz. 1999).

16 **III. Analysis**

17 In their motion to dismiss, Defendants cite only Rule 13(a) to support their
18 conclusory assertion that all of Plaintiffs’ “claims arise out of the same transaction or
19 occurrence that was the subject matter of Defendants’ eviction lawsuit filed in San Tan
20 Justice Court in Maricopa County.” (Doc. 18 at 2-3.) Therefore, Defendants assert that

22 ¹ In this order, unless otherwise noted, references to Rule 13(a) are to the Arizona
23 Rules of Civil Procedure, which provide that “[a] pleading shall state as a counterclaim
24 any claim that—at the time of its service—the pleader has against an opposing party if
the claim . . . arises out of the out of the transaction or occurrence that is the subject
matter of the opposing party’s claim.” Ariz. R. Civ. P. 13(a).

25 ² In *Pochiro*, the Ninth Circuit observed that Rule 13(a) is the same in the Arizona
26 and federal rules of civil procedure, and that Arizona, like the federal courts, applies the
liberal “logical relationship” test to determine whether two claims arise out of the same
“transaction or occurrence.” *Pochiro*, 827 F.2d at 1249 (citations omitted). “This
flexible approach to Rule 13 problems attempts to analyze whether the essential facts of
the various claims are so logically connected that considerations of judicial economy and
fairness dictate that all the issues be resolved in one lawsuit.” *Id.* (quoting *Harris v.*
Steinem, 571 F.2d 119, 123 (2d Cir. 1978)).

1 Plaintiffs' claims are barred as compulsory counterclaims "that should have been brought
2 at the earlier eviction proceedings in state court." (*Id.*) Defendants' motion does not
3 address the elements to establish that res judicata applies.

4 In response, Plaintiffs argue that Rule 13(a) does not apply to forcible entry
5 detainer ("FED") actions.³ (Doc. 21 at 7-9.) Plaintiffs alternatively argue that even if
6 Rule 13(a) applied in an eviction action, their claims in Counts One and Two would not
7 be barred by res judicata because they are not compulsory counterclaims. (Doc. 21 at
8 10.) In their reply, Defendants argue that Rule 13(a) applies to eviction actions and that
9 Plaintiffs' claims are compulsory counterclaims because they arise out of the same
10 transaction or occurrence as the eviction action and involve the same parties. (Doc. 22 at
11 2-4.) As discussed below, the Court concludes that, subject to exceptions that do not
12 appear to apply to Plaintiffs' claims, Rule 13(a) does not apply in eviction actions.
13 Therefore, Defendants have not established that Plaintiffs were required to assert these
14 claims as compulsory counterclaims in the state court eviction proceedings and that these
15 claims are barred by res judicata. Because this conclusion resolves the motion to dismiss,
16 the Court does not address the parties' alternative arguments.

17 **1. Counterclaims in Eviction Actions**

18 The Arizona Rules of Procedure for Eviction Actions provide that "[t]he Arizona
19 Rules of Civil Procedure apply only when incorporated by reference in these rules, except
20 that Rule 80(c) shall apply in all courts and Rules 42.1 and 42.2 shall apply in the
21 superior courts." Ariz. R. P. Evict. Act. 1. In Rule 8, "Counterclaims and
22 Consolidation," these rules further provide that "[u]nless specifically provided for by
23 statute, no counterclaims, cross claims, or third party claims may be filed in eviction
24 actions. Any counterclaim filed without a statutory basis shall be stricken and dismissed
25 without prejudice." *Id.* at 8(a). Plaintiffs argue that because the Rules of Procedure for

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27 ³ Rule 1 of the Rules of Procedure for Eviction Actions states that "[t]hese rules
28 shall govern the procedure in superior courts and justice courts involving forcible and
special detainer actions, which are jointly referred to in the rules as 'eviction actions.' For purposes of these rules, there shall only be one form of action known as an 'eviction
action.'" Ariz. R. P. Evict. Act. 1.

1 Eviction Actions do not incorporate Rule 13(a), counterclaims are not permitted in
2 eviction actions. (Doc. 21 at 7-8.) To support their argument, Plaintiffs cite *Met. Life*
3 *Ins. Co. v. Tibshraeny*, 2017 WL 4369434, at *1 (Ariz. Ct. App. Oct. 3, 2017), an
4 unpublished decision in which the court of appeals found that “Rule 13(a) does not apply
5 to a FED action.”

6 In *Tibshraeny*, the court explained that “a civil property dispute may be
7 maintained separately from a FED action where the two cases present different issues,
8 including where the former addresses the validity of title and the latter is concerned only
9 with the right of possession.” *Id.* at *2 (citations omitted). The court of appeals further
10 explained that as a matter of policy, which the Arizona Supreme Court “stated decades
11 ago,” counterclaims are not permitted in FED actions because these actions are intended
12 to provide an efficient and speedy remedy for obtaining possession of a premises:

13 [T]he object of a forcible entry and detainer action is to afford
14 a summary, speedy and adequate remedy for obtaining
15 possession of premises withheld . . . and . . . this objective
16 would be entirely frustrated if the defendant were permitted to
17 deny his landlord’s title, or to interpose customary and usual
18 defenses permissible in the ordinary action at law. For this
19 reason counterclaims, offsets and cross complaints are not
20 available either as a defense or for affirmative relief in such
21 action, as indicated by our statutes and the statutes of most
states. And for the same reason, the merits of the title may not
be inquired into in such an action, for if the merits of the title
and the other defenses above enumerated were permitted and
the court heard testimony concerning them, then other and
secondary issues would be presented to the court and the
action would not afford a summary, speedy and adequate
remedy for obtaining possession of the premises.

22 *Id.* (quoting *Old Bros. Lumber Co. v. Rushing*, 167 P.2d 394, 397 (Ariz. 1946) (emphasis
23 added)); *see also* Ariz. Rev. Stat. § 12-1177(A) (“On the trial of an action of forcible
24 entry or forcible detainer, the only issue shall be the right of actual possession and the
25 merits of title shall not be inquired into.”).

26 Plaintiffs conclude that an appropriate counterclaim in an eviction action “would
27 only concern a claim of how the landlord violated the rental agreement and if any notices
28 were required, the approximate date and manner those notices were sent.” (Doc. 21 at 9.)

1 Plaintiffs argue that their claims would have been dismissed if they had asserted them as
2 counterclaims in the eviction action and, therefore these claims are not barred as
3 compulsory counterclaims that should have been asserted in the earlier action.

4 In their reply, Defendants argue that *Tibshraeny* is distinguishable and does not
5 support Plaintiffs' arguments because in that case the separate action at issue addressed
6 the validity of title, which is specifically prohibited by § 12-1177(A) and, therefore, those
7 claims in the separate action were not compulsory counterclaims. (Doc. 22 at 2.) Thus,
8 Defendants suggest that counterclaims are prohibited in eviction actions only if they raise
9 the issue of title, and that various other issues may be raised in a counterclaim. (Doc. 22
10 at 2 (citing *Tibshraeny*, 2017 WL 4369434, at *2).)

11 However, *Tibshraeny* does not support Defendants' suggestion that "other types of
12 issues," construed broadly, may be addressed as counterclaims in a FED action. Instead,
13 in the section of the decision that Defendants cite, the court stated that "[u]nder limited
14 circumstances, the right to possession cannot be determined without resolving 'an issue
15 whose resolution is a prerequisite to determining which party is entitled to possession.'"
16 *Tibshraeny*, 2017 WL 4369434, at *2 (citing *Colonial Tri-City Ltd. P'ship v. Ben*
17 *Franklin Stores, Inc.*, 880 P.2d 648, 653 (Ariz. Ct. App. 1993) (explaining that the relief
18 available in FED actions is limited because the object of such actions is to provide a
19 summary, speedy, and adequate means for obtaining possession of a premises and,
20 therefore, whether the parties entered a landlord-tenant relationship is not at issue and
21 must be determined in general civil action).)

22 As set forth below, the applicable Arizona statutes and case law establish that
23 Plaintiffs construe the scope of permissible counterclaims in eviction actions too
24 narrowly to allow only claims based on the rental agreement, and Defendants construe
25 the scope of permissible counterclaims too broadly to allow any claims logically related
26 to the eviction action. In *Mead, Samuel & Co. v. Dyar*, 622 P.2d 512, 515-16 (Ariz. Ct.
27 App. 1980), the court of appeals addressed the scope of permissible counterclaims in
28 eviction actions. In *Dyar*, the defendant-tenant appealed from a judgment entered in the

1 plaintiff-landlord's FED action. The defendant-tenant argued that the court improperly
2 dismissed his counterclaims in the FED action, which were based on the landlord's
3 alleged failure to pay tenant for cleaning carpets in the apartment complex and for
4 tenant's false arrest and imprisonment arising from landlord's breach of peace complaint.
5 *Id.* at 513.

6 The defendant-tenant asserted that he had a right to assert his counterclaims in an
7 FED action under Ariz. Rev. Stat. § 33-1365A, which is a part of the Arizona Residential
8 Landlord and Tenant Act ("ARLTA"). *Id.* at 514. The plaintiff-landlord asserted that
9 defendant's counterclaims were precluded by Ariz. Rev. Stat. § 12-1177A, which
10 provides that in a FED action the only issue is the right of possession. *Id.* at 515. The
11 plaintiff-landlord cited "several cases which held that counterclaims, offsets and cross-
12 complaints may not be entertained in forcible entry or forcible detainer proceedings."
13 (*Id.* (citing *Hinton v. Hotchkiss*, 174 P.2d 749 (Ariz. 1946); *Rushing*, 167 P.2d 394;
14 *Gangadean v. Erickson*, 405 P.2d 1338 (Ariz. 1972).) The court of appeals stated that the
15 issue before it was how to reconcile the apparent conflict between § 33-1365, which
16 permits some counterclaims in FED actions, and the prior case law, which interprets
17 § 12-1177A as prohibiting any counterclaims in such actions. *Dyar*, 622 P.2d at 515.

18 The court of appeals found that because the ARLTA was enacted in 1973, after the
19 cited decisions interpreting § 12-1177A, the legislature intended to change the judicial
20 construction of § 12-1177A. *Id.* at 516. The court concluded that by enacting § 33-
21 1365A, the legislature changed the law to give tenants the right to assert counterclaims in
22 an action by the landlord for possession or for rent "for any amount which [the tenant]
23 may recover under the rental agreement or [the ARLTA]." *Id.* (quoting Ariz. Rev. Stat.
24 § 3-1365A).) The court further explained that the ARLTA includes numerous provisions
25 that grant tenants the right to recover damages when they are injured by a landlord's
26 wrongful conduct. *Dyar*, 622 P.2d at 516. The court rejected the defendant-tenant's
27 argument that any claims arising out of the landlord-tenant relationship are claims for
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1 damages under the ARLTA and, therefore, are permissible counterclaims in a FED
2 action. *Id.*

3 The court found that § 33-1365A could not be construed so broadly and instead
4 must be construed with § 12-1177A, “which for many years had been construed as
5 providing an expeditious summary remedy for possession, isolated from collateral
6 controversies not directly related to the single issue of possession.” *Id.* Thus, the court
7 concluded that “[b]y enacting § 33-1365A the Legislature broadened the scope of a
8 forcible detainer proceeding to the extent of permitting counterclaims for landlord
9 liabilities established by the rental agreement or established by the terms of the act itself.”
10 *Id.* “In other words, for a tenant counterclaim to be permissible under § 33-1365A, the
11 asserted liability must have a specific basis in the rental agreement or in the landlord
12 tenant act.” *Id.*

13 Defendants do not address *Mead*, or the court of appeals’ analysis of permissible
14 counterclaims in FED actions. Instead, they argue that Rule 13(a) applies in FED actions
15 and cite *Van Buren Apartments v. Adams*, 701 P.2d 583, 587 (Ariz. Ct. App. 1984).
16 (Doc. 22 at 2.) Defendants quote language from that decision stating that “tenants can
17 assert counterclaims in a forcible entry and detainer action for landlord liabilities
18 established by the rental agreement or by the terms of the act itself.” (Doc. 22 at 2
19 (quoting *Adams*, 701 P.2d at 587).) However, Defendants’ argument ignores that in
20 *Adams*, the court applied *Mead*, and was addressing claims under the ARLTA when it
21 referred to “the terms of the act itself.” See *Adams*, 701 P.2d at 587 (citing *Mead*, 622
22 P.2d at 512).

23 Furthermore, it is clear that in *Adams* the court was not expanding permissible
24 counterclaims in FED actions beyond those claims arising from the rental agreement or
25 the ARLTA. Instead, the court addressed whether a claim for retaliatory eviction under
26 the ARLTA could be asserted as a defense in an eviction action. *Adams*, 701 P.2d 584-
27 85 (analyzing tenant’s defense under the ARLTA). Thus, *Adams* did not expand the
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1 permissible scope of counterclaims in FED actions beyond those claims recognized in
2 *Mead*.

3 Defendants also assert that a decision in this district allowed a defendant's
4 counterclaims for violations of the Fair Housing Act ("FHA") in an eviction action.
5 (Doc. 22 at 2 (citing *Phoenix 328 Apartments, LLC v. Walker*, 2013 WL 5313261 (D.
6 Ariz. Sept. 23, 2013).) However, in *Phoenix 328 Apartments*, the court did not consider
7 whether claims under the FHA could be asserted as counterclaims in an eviction action.
8 Instead, the court analyzed whether the defendant-tenant could remove an eviction action
9 from state to federal court by asserting claims of race and disability discrimination under
10 the FHA. *Id.* at *2. The court did not state that such claims were permissible
11 counterclaims in an eviction action in state court, but instead stated only that these claims
12 could not convert the action into one "arising under federal law" for purposes of federal
13 question jurisdiction. *Id.* Therefore, the court concluded that the defendant had not
14 properly removed the action to federal court. *Id.* This decision also does not provide any
15 basis for the Court to conclude that the permissible scope of counterclaims in eviction
16 actions exceeds those claims recognized in *Mead*.

17 Finally, Defendants argue that the Rules of Procedure for Eviction Actions allow
18 counterclaims because Rule 8(a) provides that a counterclaim must be in writing and state
19 specific facts claiming that the landlord has violated the rental agreement or an applicable
20 statute. (Doc. 22 at 2 (citing Ariz. R. P. Evict. Act. 8(a).) Defendants' argument,
21 however, ignores the preceding two sentences of Rule 8(a), which state that
22 counterclaims may only be asserted if provided by statute, and that any counterclaim filed
23 without a statutory basis will be dismissed without prejudice. *See* Ariz. R. P. Evict. Act.
24 8(a). Furthermore, the language in Rule 8(a) that Defendants cite is consistent with the
25 court of appeals' decision in *Mead*, which recognized counterclaims in FED actions
26 based on the rental agreement or ARLTA. Therefore, to determine whether Plaintiffs'
27 claims are compulsory counterclaims that Plaintiffs' should have asserted in the eviction
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1 action, the Court considers whether Plaintiffs' claims arise under the rental agreement or
2 the ARLTA.

3 **2. Plaintiffs' Claims**

4 The Complaint alleges that Defendants filed the eviction action based on an
5 untreated roach infestation. (Doc. 1 at ¶¶ 39, 44, 52.) Therefore, for this order, the Court
6 assumes that the eviction action was based on an "untreated roach infestation that
7 constituted a breach of the parties' rental agreement."⁴ (Doc. 1 at ¶¶ 39, 44, 52; Doc. 18
8 at 2.) Thus, the essential facts in the state court eviction action included the terms of the
9 rental agreement, whether Plaintiffs' treated the roach infestation and whether an alleged
10 failure to do so violated the rental agreement, or whether Plaintiffs otherwise breached
11 the lease agreement.

12 In Counts One and Two of the Complaint, Plaintiffs allege violations of provisions
13 in the Federal and Arizona Fair Housing Acts, 42 U.S.C. § 3604(f)(1)-(3) and Ariz. Rev.
14 Stat. § 41-1491.19(5). (Doc. 1 at ¶¶ 57-71; 72-86.) These claims are based on Plaintiffs'
15 Ruby and Juanetta Wagoner's alleged disabilities (Doc. 1 at ¶ 28, 31), and Plaintiff
16 Alexander's alleged membership in a protected class that the fair housing acts were
17 meant to protect. (*Id.* at ¶¶ 64, 79.) These claims also involve Plaintiffs' request for
18 reasonable accommodation (*Id.* at ¶¶ 40-42), and whether Defendants discriminated
19 against Plaintiffs in the terms, conditions, or privileges of a rental dwelling or in the
20 provision of services in connection with the dwelling because of a disability. (*Id.* at
21 ¶¶ 57-71, 72-86.) In Count Five, Plaintiffs assert a claim for intentional infliction of
22 emotional distress based on Defendants' alleged violations of Plaintiffs' civil rights. (*Id.*
23 at ¶¶ 104-108.)

24 Plaintiffs assert that their claims alleging violations of their rights under state and
25 federal fair housing laws did not give them the right to immediate possession of the
26 property and, therefore, were not compulsory counterclaims in the eviction action.
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28 ⁴ A landlord has a statutory right to terminate a lease upon a material breach of
tenancy or lease. Ariz. Rev. Stat. §§ 12-1171, 33-361.

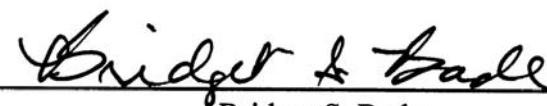
1 (Doc. 21 at 9, 16-17.) In their reply, Defendants do not respond to Plaintiffs' arguments
2 about their claims in Counts One, Two and Five, and instead assert, without explanation,
3 that all of Plaintiffs' claims "are related to whether they had the right to possession of the
4 property." (Doc. 22 at 3.) Defendants argue that Plaintiffs' claims are logically related to
5 the eviction action and are barred as compulsory counterclaims that Plaintiffs should have
6 asserted in that action. *Id.* Thus, Defendants do not address whether Plaintiffs' state and
7 federal fair housing claims, and the related emotional distress claim, arise under the rental
8 agreement or the ARLTA. Because it appears that these claims are not based on the
9 rental agreement or the ARLTA, and Defendants have not established that these claims
10 are barred, the Court denies the motion to dismiss Counts One, Two, and Five.

11 In Counts Three and Four, Plaintiffs allege claims for a breach of the implied
12 warranty of habitability and negligence. (Doc. 1 at ¶¶ 87-97, 98-103.) Although it
13 appears that these claims may arise from the rental agreement and thus should have been
14 asserted in the eviction action, the parties have not addressed this issue and, therefore, the
15 Court will not decide this issue on the briefing the parties provided. Because Defendants,
16 as the party asserting res judicata, have the burden of establishing that Plaintiffs' claims
17 are barred and have not met that burden, the Court will not dismiss Plaintiffs' claims
18 based on the briefing on the motion to dismiss. *See State Compensation Fund*, 3 P.3d at
19 1044. Therefore, the Court will deny Defendants' motion to dismiss Counts Three and
20 Four.

21 Accordingly,

22 **IT IS ORDERED** that Defendants' Motion to Dismiss (Doc. 18) is **DENIED**.

23 Dated this 24th day of April, 2018.

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Bridget S. Bade
United States Magistrate Judge